Ng King Chong & Anor v Ooi Kim Geik & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCC)(A)-1532–08 OF 2017
ROHANA YUSUF, VERNON ONG AND HARMINDER SINGH JJCA
15 OCTOBER 2018

Civil Procedure — Jurisdiction — Inherent jurisdiction of court — Setting aside winding up petition order — Whether court had inherent jurisdiction to set aside order of court made in breach of natural justice

Companies and Corporations — Winding up — Just and equitable ground — Application to set aside winding up order — Whether there was breach of natural justice — Whether appellants ought to be made parties to petition — Whether appellants ought to be served with cause papers — Whether leave from winding up court required

This was an appeal from the decision by the Shah Alam High Court where the learned judge had dismissed the appellants': (a) originating summons to, inter alia, set aside a winding up order and to declare the liquidation of the company Nation Park Sdn Bhd ('the company') to be null and void; and (b) application in encl 5 in which an injunction was sought against the liquidator of the company ie the third respondent from carrying out the liquidation of the company until the disposal of the originating summons. The company was established by the first respondent's late husband, one Ng Kin Yong. The late Ng Kin Yong had his siblings involved in the business, namely, the first and second appellants and another brother named Ng King Siong. The first respondent, being the widow of the late Ng Kin Yong, was appointed as a director of the company on at the request of her late husband in order to maintain the company as family business. However, she was never involved in the operation and management of the company and she relied on the siblings of her late husband to manage the company. Her role was limited to checking and monitoring the finance of the company. Shortly the company's business began to stagnate and the appellants and Ng King Siong submitted their incentive claims to the company and the first respondent for approval. The first respondent refused to approve the purported incentive claims as they were not supported by any agreement or resolution between the directors and shareholders to endorse such an incentive scheme; no such incentive scheme existed; and the incentive claims were made without basis, wrong and inconsistent with the arrangement allowed by the late Ng Kin Yong. This resulted in a loss of confidence and trust between the first respondent and the siblings of the late husband. A meeting to resolve the dispute between the

parties in the presence of their solicitors was held but failed to achieve any settlement. The first respondent then resorted to the court to wind up the company. The first respondent filed a petition for winding up and the company was duly wound up on 12 April 2017. The appellants then filed the originating summons to set aside the said winding up order. The originating summons and application in encl 5 were dismissed on the grounds of: (i) the appellants' failure to obtain leave from the winding up court before filing the originating summons and encl 5 amounted to an abuse of process; (ii) the appellants should have proceeded with their claims or action in the winding up court and not by instituting a fresh suit as the appellants had done; and (iii) the appellants were aware of the winding up petition filed against the company but did not take part in that proceedings. Hence, this appeal. The appellants argued that the first respondent, as the petitioner, had failed to include the appellants as parties in the winding up petition and had failed to serve the cause papers on the appellants as members/contributories of the company. The first respondent argued in turn that the filing of a fresh action by the appellants amounted to an abuse of the court process. The appeal should also fail as the appellants had failed to obtain leave of the winding up court. It was further maintained that there had been no breach of natural justice as there was no requirement under the Companies Act 2016 ('the CA 2016') or the Companies (Winding-Up) Rules 1972 for the petition to be served on the shareholders of the company.

Held, allowing the appeal, setting aside the order of the High Court and remitting the matter to the High Court to be reheard with the appellants added as respondents:

(1) The grounds relied upon in this case, to establish the just and equitable ground, had much in common to an oppression petition presented under s 181 of the Companies Act 1965. It appeared incongruous to the assertion that in a winding up petition under the just and equitable ground, which considered to be similar in many ways to an oppression action, there was no requirement to name as respondents the parties who are alleged to have acted against the interests of the company. It was only fair and just that those upon whom serious allegations had been made were given the opportunity to respond to the petition by filing affidavits in reply (see paras 24 & 28).

(2) It was no answer to say that the appellants would had been duly served with the advertisement as required under r 24 of the Companies (Winding-Up) Rules 1972. Such advertisement would not disclose the allegations made against the appellants and they would remain clueless. The petition filed by the first respondent ought to have named the appellants as respondents and the petition ought to have been served on them in the normal way (see paras 29–30).

(3) The High Court had the jurisdiction to set aside its own order made in breach of natural justice and to order the matter to be re-heard with the appellants being allowed to be heard on the petition. The argument of *functus officio* had no traction as only arguments of one side had been heard albeit in breach of the rules of natural justice. The High Court itself was in error when failing to order the petition to be served on the parties against whom serious allegations of wrongdoing were made and who would also be most affected by the order for winding up of the company. In the circumstances, it would be unjust to disregard such error and disallow the appellants from being heard on the merits (see para 36).

(4) It was also pointless to argue that the application to set aside the order should have been made in the winding up court and not by a fresh action. An order made in breach of the rules of natural justice was a nullity and could be challenged in collateral proceedings. The argument that the appeal was fatal as the appellants had failed to first obtain leave of the winding up court under s 471 of the CA 2016 was a non-starter. No leave was required as the action filed by the appellants was not to obtain any remedy for or against the company but to declare that the winding up of the company itself was null and void (see paras 37–38).

[Bahasa Malaysia summary

Ini adalah rayuan daripada keputusan Mahkamah Tinggi Shah Alam di mana hakim yang bijaksana telah menolak: (a) saman pemula perayu-perayu untuk, antara lain, mengetepikan perintah penggulungan dan mengisytiharkan likuidasi syarikat Nation Park Sdn Bhd ('syarikat') menjadi batal dan tidak sah; dan (b) permohonan perayu-perayu dalam lampiran 5 di mana injunksi diminta terhadap pelikuidasi syarikat iaitu responden ketiga daripada menjalankan likuidasi syarikat itu sehingga pembatalan saman pemula. Syarikat itu ditubuhkan oleh mendiang suami responden pertama, Ng Kin Yong. Mendiang Ng Kin Yong mempunyai adik-beradiknya yang terlibat dalam perniagaan, iaitu, perayu pertama dan kedua dan adik lelaki lain bernama Ng King Siong. Responden pertama, sebagai balu pada mendiang Ng Kin Yong, dilantik sebagai pengarah syarikat atas permintaan mendiang suaminya untuk mengekalkan syarikat itu sebagai perniagaan keluarga. Walau bagaimanapun, beliau tidak pernah terlibat dalam operasi dan pengurusan syarikat itu dan beliau bergantung kepada adik-beradik suaminya untuk menguruskan syarikat itu. Peranannya adalah terhad untuk memeriksa dan memantau kewangan syarikat. Tidak lama kemudian perniagaan syarikat mula terhenti dan perayu dan Ng King Siong mengemukakan tuntutan insentif mereka kepada syarikat itu dan responden pertama untuk kelulusan. Responden pertama enggan meluluskan tuntutan insentif yang dikatakan kerana mereka tidak disokong oleh sebarang perjanjian atau resolusi antara pengarah dan pemegang saham untuk menyokong skim insentif sedemikian; tiada skim insentif sedemikian wujud; dan tuntutan insentif dibuat tanpa

dasar, salah dan tidak konsisten dengan susunan yang dibenarkan oleh Ng Kin Yong. Ini mengakibatkan hilang keyakinan dan kepercayaan antara responden pertama dan adik-beradik mendiang suami. Satu mesyuarat untuk menyelesaikan pertikaian antara pihak-pihak di hadapan peguam mereka telah diadakan tetapi gagal untuk mencapai apa-apa penyelesaian. Responden pertama kemudiannya pergi ke mahkamah untuk menggulung syarikat itu. Responden pertama memfailkan petisyen untuk penggulungan dan syarikat itu digulung pada 12 April 2017. Perayu-perayu kemudian memfailkan saman pemula untuk mengetepikan perintah penggulungan tersebut. Saman pemula dan permohonan lampiran 5 dibatalkan dengan alasan: (i) kegagalan perayu-perayu mendapatkan kebenaran dari mahkamah penggulungan sebelum memfailkan saman pemula dan lampiran 5 membawa kepada penyalahgunaan proses; (ii) perayu-perayu sepatutnya meneruskan tuntutan atau tindakan mereka di mahkamah penggulungan dan bukan dengan memulakan guaman baru sebagaimana yang dilakukan perayu-perayu; dan (iii) perayu-perayu sedar akan petisyen penggulungan yang difailkan terhadap syarikat itu tetapi tidak mengambil bahagian dalam prosiding itu. Oleh itu, rayuan ini. Perayu-perayu berpendapat bahawa responden pertama, sebagai pempetisyen, telah gagal memasukkan perayu-perayu sebagai pihak dalam petisyen penggulungan dan gagal menyampaikan kertas kausa kepada perayu-perayu sebagai anggota/penyumbang syarikat. Responden pertama berpendapat bahawa pemfailan tindakan baru oleh perayu-perayu adalah penyalahgunaan proses mahkamah. Rayuan itu juga harus gagal apabila perayu-perayu gagal mendapatkan kebenaran mahkamah penggulungan. Ia terus dikekalkan bahawa tiada pelanggaran keadilan alam semulajadi kerana tiada keperluan di bawah Akta Syarikat 2016 ('Akta') atau Kaedah-Kaedah Syarikat (Penggulungan) 1972 untuk petisyen disampaikan kepada para pemegang saham syarikat.

Diputuskan, membenarkan rayuam, mengetepikan perintah Mahkamah Tinggi dan meremitkan perkara ke Mahkamah Tinggi untuk didengar semula dengan perayu-perayu ditambah sebagai responden:

(1) Alasan yang diguna pakai dalam kes ini, untuk menubuhkan alasan yang adil dan saksama, mempunyai persamaan yang sama dengan petisyen penindasan yang dibentangkan di bawah s 181 Akta Syarikat 1965. Ia kelihatan janggal dengan dakwaan bahawa dalam petisyen penggulungan di bawah alasan adil dan saksama, yang dianggap sama dalam banyak cara untuk tindakan penindasan, tiada keperluan untuk menamakan responden sebagai pihak yang didakwa telah bertindak terhadap kepentingan syarikat. Ianya adil dan saksama bahawa mereka yang diberi tuduhan serius telah diberikan peluang untuk menjawab kepada petisyen dengan memfailkan afidavit balasan (lihat perenggan 24 & 28).

(2) Tiada jawapan untuk mengatakan bahawa perayu-perayu telah disampaikan dengan sewajarnya dengan iklan seperti yang dikehendaki

di bawah k 24 dari Kaedah-Kaedah Syarikat (Penggulungan) 1972. Pengiklanan tersebut tidak akan mendedahkan tuduhan yang dibuat terhadap perayu-perayu dan mereka tidak akan tahu apa-apa. Petisyen yang difailkan oleh responden pertama sepatutnya menamakan perayu-perayu sebagai responden dan petisyen itu sepatutnya disampaikan kepada mereka secara normal (lihat perenggan 29–30).

(3) Mahkamah Tinggi mempunyai bidang kuasa untuk mengetepikan perintahnya sendiri yang melanggar keadilan semulajadi dan memerintahkan perkara itu untuk didengar semula dengan perayu dibenarkan didengar di petisyen. Hujahan *functus officio* tidak mempunyai kuasa kerana hanya hujahan satu pihak yang telah didengar walaupun melanggar peraturan keadilan semulajadi. Mahkamah Tinggi sendiri terkhilaf apabila gagal memerintahkan petisyen untuk disampaikan kepada pihak-pihak yang menentang tuduhan melakukan salah laku yang serius dan juga yang akan terkesan oleh perintah untuk penggulungan syarikat. Dalam keadaan ini, adalah tidak adil untuk mengabaikan kesilapan itu dan tidak membenarkan perayu-perayu daripada didengar dengan merit (lihat perenggan 36).

(4) Tiada gunanya untuk membantah bahawa permohonan untuk mengetepikan perintah itu sepatutnya dibuat di mahkamah penggulungan dan bukan dengan tindakan baru. Perintah yang dibuat melanggar peraturan keadilan semulajadi adalah batal dan boleh dicabar dalam prosiding kolateral. Hujahan bahawa rayuan itu fatal kerana perayu telah gagal terlebih dahulu mendapatkan kebenaran mahkamah penggulungan di bawah s 471 Akta adalah salah. Tiada kebenaran diperlukan kerana tindakan yang difailkan oleh perayu bukan untuk mendapatkan sebarang remedi untuk atau terhadap syarikat tetapi mengisytiharkan bahawa penggulungan syarikat itu sendiri adalah batal dan tidak sah (lihat perenggan 37–38).]

Notes

For cases on inherent jurisdiction of court, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6280–6293.

For cases on just and equitable ground, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1599–1604.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Chiew Sze Sun & Anor v Cast Iron Products Sdn Bhd & Ors [1993] MLJU 115; [1994] 1 CLJ 157, HC (refd)

Dato' Ting Check Sii v Marine Utama Sdn Bhd & Anor [2013] 9 MLJ 527, HC (refd)

Ebrahimi v Westbourne Galleries Ltd and others [1972] 2 All ER 492, HL (refd)

EU Finance Berhad v Lim Yoke Foo [1982] 2 MLJ 37, FC (refd)
Edmund Charles Liebenberg v ICB-Griffin Manufacturing Sdn Bhd & Ors [2005] 5 MLJ 259, HC (refd)
Grafton Isaacs v Emery Robertson [1985] AC 97, PC (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)
Jet-Tech Materials Sdn Bhd & Anor v Yushiro Chemical Industry Co Ltd & Ors and another appeal [2013] 2 MLJ 297, FC (refd)
Lee Tain Tshung v Hong Leong Finance Bhd [2000] 3 MLJ 364, CA (refd)
Muniandy a/l Thamba Kaundan & Anor v D&C Bank Bhd & Anor [1996] 1 MLJ 374; [1996] 2 CLJ 586, FC (refd)
O'Neill and another v Phillips and others, Re a company [1999] 2 BCLC 1, HL (refd)
Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corp (M) Bhd & Anor [2010] MLJU 269; [2010] 6 CLJ 721, FC (refd)
Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd; (BSN Commercial Bank (M) Bhd & Ors, interveners) [2000] 3 MLJ 201, CA (refd)
Sinarlim Sdn Bhd v Waja Destinasi (M) Sdn Bhd [2011] 5 MLJ 416; [2012] 3 CLJ 678, CA (refd)
Varusay Mohamed Shaik Abdul Rahman v SVK Patchee Bros (N) Sdn Bhd [2002] 3 MLJ 674, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016) ss 181, 181A, 181B, 181C, 181D, 181E, 218(1)(f), (1)(i)
Companies Act 2016 ss 346, 347, 348, 349, 350, 471
Companies (Winding-Up) Rules 1972 rr 24, 25, Form 4

KF Wong (YF Chan with him) (KF Wong & Lee) for the appellants.
Goh Keng Tat (Alexavier Lee with him) (Goh Keng Tat & Co) for the first respondent.
Michael Chow (Nicholas Poon with him) (Michael Chow) for the second and third respondents.

Harmindar Singh JCA (delivering judgment of the court):

[1] This appeal emanated from the decision by the Shah Alam High Court delivered on 14 July 2017. The learned judge had dismissed the appellants' originating summons to, inter alia, set aside a winding up order and to declare the liquidation of the company Nation Park Sdn Bhd ('the company') to be null and void.

[2] The learned judge had also, at the same hearing, dismissed the appellants' application in encl 5 in which an injunction was sought against the liquidator of the company, the third respondent here, from carrying out the liquidation of the company until the disposal of the originating summons.

[3] Aggrieved with the decision, the appellants filed the instant appeal. After hearing the parties and taking into consideration the written submissions, we unanimously allowed the appeal and set aside the order of the High Court. Our reasons for doing so now follow and will constitute the judgment of the court.

BACKGROUND FACTS

[4] On 4 June 1993, the company was established by the first respondent's late husband, one Ng Kin Yong. The business activity of the company included nursery plantation, landscaping and maintenance of landscape gardens. The late Ng Kin Yong had his siblings involved in the business, namely, the first and second appellants and another brother named Ng King Siong.

[5] Each sibling was entrusted with different responsibilities in that they handled different departments and projects of the company. The relationship of the late Ng Kin Yong and his siblings in the company was essentially a 'quasi-partnership'. The late Ng Kin Yong, as the founder and majority shareholder of the company, was at all times the decision maker of the company. He also managed the day-to-day operations of the company and held the position of director and project manager of the company.

[6] On 16 October 2015, the late Ng Kin Yong was diagnosed with terminal cancer. He passed away on 29 March 2016. Before the late Ng Kin Yong passed away, the shareholding of the company was held by the parties as follows:

	Shareholder/Unit Shares/Percentage		
(a)	Ng Kin Yong	313,875	77.50%
(b)	Ng Kim Pin	30,375	7.50%
(c)	Ng King Chong	60,750	15.00%

[7] The first respondent, being the wife (now widow) of the late Ng Kin Yong, was appointed as a director of the company on 28 March 2016 at the request of her late husband in order to maintain the company as family business. After the demise of the late Ng Kin Yong, all of his shares were transmitted to the first respondent.

[8] Despite the transfer of the shares, the first respondent was never involved in the operation and management of the company. She relied on the siblings of her late husband to manage the company. The first respondent's role was limited to checking and monitoring the finance of the company which included being a joint signatory with the second appellant in approving the company's cheques.

[9] Shortly after the demise of the late Ng Kin Yong, the company's business began to stagnate. No new tender projects were coming in. The company was surviving mainly on the balance works of the previous projects and some maintenance projects.

[10] In or around the months of July and August 2016, both the first and second appellants and Ng King Siong submitted their incentive claims to the company. The same were given to the first respondent for approval. The incentive claims by them were set out as follows:

(a) the first appellant was claiming the sum of RM333,829.98 from the years of 2009–2016;

(b) the second appellant was claiming the sum of RM100,006.88 from the years of 2013–2016; and

(c) Ng King Siong was claiming the sum of RM1,005,501.58 from the years of 2008–2016.

[11] The first respondent claimed she was shocked by these claims as they were not supported by any agreement or resolution between the directors and shareholders to endorse such an incentive scheme. After checking the company's accounting record, the first respondent claimed that no such incentive scheme existed. The first respondent took the position that the purported incentive claims made by the siblings were without basis, wrong and inconsistent with the arrangement allowed by the late Ng Kin Yong. As such, the first respondent refused to approve the purported incentive claims.

[12] With the first respondent's refusal to approve the incentive claims, the relationship between them deteriorated. The result was a loss of confidence and trust between the first respondent and the siblings of the late husband. The operation and management of the company was severely affected. A meeting to resolve the dispute between the parties in the presence of their solicitors was held on 26 October 2016 but failed to achieve any settlement.

[13] The first respondent then resorted to the court to wind up the company. The first respondent filed a petition for winding up the company on 14 December 2016 and the company was duly wound up on 12 April 2017. The appellants then filed the instant originating summons to set aside the said winding up order.

AT THE HIGH COURT

[14] At the High Court, as alluded to at the outset, the originating summons and the application in encl 5 were dismissed. The grounds for doing so are set out in the judgment of the learned judge and can be summarised as follows:

(a) the appellants' failure to obtain leave from the winding up court before filing the originating summons and encl 5 amounted to an abuse of process;

(b) the appellants should have proceeded with their claims or action in the winding up court and not by instituting a fresh suit as the appellants have done; and

(c) based on the affidavits filed, the appellants were aware of the winding up petition filed against the second respondent but did not take part in that proceedings.

THE INSTANT APPEAL

[15] Before us, the decision of the High Court was assailed by the appellant on a number of grounds. However, we considered that the only ground which merited consideration, and the only ground which had any chance of success, was the ground of breach of rules of natural justice based on the principle as set out by the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, now commonly known as the *Badiaddin* principle.

[16] In essence, the complaint of the appellants was that the first respondent, as the petitioner, had failed to include the appellants as parties in the winding up petition. It was also asserted that the first respondent as petitioner had failed to serve the cause papers on the appellants as members/contributories of the company.

[17] The first respondent argued in turn that the filing of a fresh action by the appellants amounted to an abuse of the court process. Citing the authority of *Sinarlim Sdn Bhd v Waja Destinasi (M) Sdn Bhd* [2011] 5 MLJ 416; [2012] 3 CLJ 678, it was contended that the proper course would have been to file an appeal to a higher court if they were not satisfied with the order granted by the court. Relying on the case of *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143, it was further argued that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction.

[18] It was also reasoned by all the respondents that the appeal should fail as the appellants had failed to obtain leave of the winding up court. Any application to set aside the winding up order ought to have been made in the winding up court. It was further maintained that there had been no breach of natural justice as there is no requirement under the Companies Act 2016 ('the CA 2016') or the Companies (Winding-Up) Rules 1972 for the petition to be served on the shareholders of the company.

[19] Arising out of these contentions, and in determining whether there had been a breach of natural justice, it is necessary, at the outset, to consider whether the appellants are right to assert that they ought to have been made parties to the petition and whether they ought to have been served with the cause papers.

[20] In this respect, it is significant that the petition was filed pursuant to ss 218(1)(f) and 218(1)(i) of the Companies Act 1965 ('the CA 1965'). Section 218(1)(f) states that the court may order the winding up of a company if 'the directors have acted in the affairs of the company in their own interests rather than the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members'. Section 218(1)(i) states that winding up may be ordered if 'the court is of opinion that it is just and equitable that the company be wound up'.

[21] Now, the winding up of a company on the just and equitable ground is one of the remedies available to a shareholder, as opposed to a creditor of the company, in the event of a shareholders' dispute or where there is some form of wrongdoing by the directors. The court's jurisdiction is usually invoked where the company is a quasi-partnership, as in the present case, but can also apply to other circumstances as case laws have shown. Common examples of when this jurisdiction has been invoked is where there is a deadlock in management (see *Dato' Ting Check Sii v Marine Utama Sdn Bhd & Anor* [2013] 9 MLJ 527) or where there is a breakdown in mutual trust and confidence among the shareholders (see *Varusay Mohamed Shaik Abdul Rahman v SVK Patchee Bros (N) Sdn Bhd* [2002] 3 MLJ 674).

[22] Other remedies available to a shareholder are in cases of oppression where the court can also order the company to be wound up under s 346 of the CA 2016. Sometimes, a share buy-out order is also made to bring an end to the oppressive conduct. Yet another recourse available to a shareholder is the statutory derivative action provided in ss 347–350 of the CA 2016 which provisions are similar to the old ss 181A–181E of the CA 1965. With the new CA 2016, however, the common law derivative action, it would appear, is no longer available to a shareholder.

[23] However, it is trite that unlike the just and equitable ground for winding up as well as the oppression action, the derivative action is instituted on behalf of the company for a cause of action which the company has against a wrongdoer. So it is quite different in that any remedy obtained is for the benefit of the company. Apart from the shareholders, creditors could also petition for the winding up of the company based on the company's inability to pay its debts.

[24] In our assessment, it is evident that the grounds relied upon in the instant case, to establish the just and equitable ground, have much in common to an oppression petition presented under the old s 181 of the CA 1965 (now replaced by s 346 of the CA 2016). In order to establish her case, the first respondent had raised serious allegation against the appellants in that they had acted against the interests of the company and were only concerned with their own benefits.

[25] Now, in an oppression action, similar allegations can sometimes be raised successfully, for example, where directors exercise their powers for an ulterior purpose (see *Edmund Charles Liebenberg v ICB-Griffin Manufacturing Sdn Bhd & Ors* [2005] 5 MLJ 259 or where there is mismanagement of a company's financial affairs (see *Chiew Sze Sun & Anor v Cast Iron Products Sdn Bhd & Ors* [1993] MLJU 115; [1994] 1 CLJ 157).

[26] The common factor in each type of action is the concept of unfairness as determined by the Federal Court in *Jet-Tech Materials Sdn Bhd & Anor v Yushiro Chemical Industry Co Ltd & Ors and another appeal* [2013] 2 MLJ 297 which decision followed the principles as set out earlier in *Ebrahimi v Westbourne Galleries Ltd and others* [1972] 2 All ER 492, *O'Neill and another v Phillips and others, Re a company* [1999] 2 BCLC 1 and *Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corp (M) Bhd & Anor* [2010] MLJU 269; [2010] 6 CLJ 721.

[27] We also note with interest that an oppression action can be brought against any director or shareholder or even third parties. In such an action, the alleged oppressors as well as the company will be named as respondents to the action. Affidavits by each party will invariably be filed to determine the truth of the allegations.

[28] In the event, it appears incongruous to us the assertion that in a winding up petition under the just and equitable ground, which we consider to be similar in many ways to an oppression action, there is no requirement to name as respondents the parties who are alleged to have acted against the interests of the company. In our view, it is only fair and just that those upon whom serious allegations have been made are given the opportunity to respond to the petition by filing affidavits in reply.

[29] We also think that it is no answer to say that the appellants would have been duly served with the advertisement as required under r 24 of the Companies (Winding-Up) Rules 1972. That provision, as we understand it, is more to provide a general notice to all creditors of the company where any action is filed to wind up the company with the intention to invite support or opposition to the petition. Under the said r 24, the petition shall be advertised

in Form 4 of the Companies (Winding-Up) Rules 1972. Such advertisement, as can be seen from a perusal of Form 4, will not disclose the allegations made against the appellants. They will, in the end, remain clueless as to the allegations against them.

[30] Service of the petition on the company as required by r 25 of the Companies (Winding-Up) Rules 1972 also offers no assistance as the company is separate from the shareholders. It does not follow that once a company is served the shareholders will be deemed to have knowledge. Their interests may not match as is evident from the factual matrix of the instant case. It is therefore our judgment that in the interests of justice, in addition to fulfilling the requirement under the said r 24, the petition filed by the first respondent ought to have named the appellants as respondents and the petition ought to have been served on them in the normal way.

[31] Since it is beyond dispute that the appellants were not named as respondents and there was no proper service on them, should the petition then be set aside as being null and void for breach of natural justice? The jurisprudence in this regard, in our view, has been settled by the *Badiaddin* principle. The Federal Court there, through the judgment of Mohd Azmi FCJ, set out the law as follows (at p 409):

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... where a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make'.

[32] And His Lordship continued his pronouncement (at p 409):

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent

jurisdiction should also be exercised judicially in exceptional cases where the defect is of such serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[33] In this connection as well, the Federal Court had earlier observed, through the judgment of Abdoolcader J (as he then was), in *EU Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37 as follows (p 39):

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent.

[34] In similar vein, the Federal Court in *Muniandy a/l Thamba Kaundan & Anor v D&C Bank Bhd & Anor* [1996] 1 MLJ 374; [1996] 2 CLJ 586, through the judgment of Edgar Joseph Jr FCJ, stated (at p 381 (MLJ); p 593 (CLJ)):

> The rule that the court has no power under any application in the action to alter or vary a judgment after it has been entered or an order after it has been drawn up, except in so far is necessary, to correct errors in expressing the intention of the court, is subject to certain *exceptions*, one of which is that an order which is a *nullity* owing to failure to comply with an essential provision such as service of process, can be set aside by the Court which made the order in the exercise of its inherent jurisdiction (see *Craig v Kanseen* [1943] 1 All ER 108 at p 113 (CA) applied in *United Malayan Banking Corpn Bhd v Syarikat Perumahan Lunas Sdn Bhd* [1988] 1 MLJ 546). If, therefore, Counsel for the chargors were correct in his contention that the *ex parte* orders were null and void — a point to which we shall be coming to shortly — then the judge was wrong in applying the principle of *functus officio* to the circumstances of the case before him. (Emphasis added.)

[35] The principles gained from the case authorities can therefore be expressed as follows. As a general rule, an aggrieved party who is dissatisfied with a final order of a court of unlimited jurisdiction must appeal to a higher court. The exception to this rule is that where an order is null and void on the grounds of breach of natural justice, illegality or lack of jurisdiction, such court will have the power under its inherent jurisdiction to set aside its own order. Where an order is a nullity, it can be successfully challenged in collateral proceedings.

[36] Reverting now to the instant case, it is our view that the High Court had the jurisdiction to set aside its own order made in breach of natural justice and to order the matter to be re-heard with the appellants being allowed to be heard on the petition. We also agree that the argument of *functus officio* had no

traction as only arguments of one side had been heard albeit in breach of the rules of natural justice. In a sense, the High Court itself was in error when failing to order the petition to be served on the parties against whom serious allegations of wrongdoing were made and who would also be most affected by the order for winding up of the company. In the circumstances, it would be unjust to disregard such error and disallow the appellants from being heard on the merits.

[37] It is also pointless to argue that the application to set aside the order should have been made in the winding up court and not by a fresh action. It is settled law, as we had earlier accepted, that any person affected by an order obtained in breach of natural justice is entitled to have it set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside such orders. In short, an order made in breach of the rules of natural justice was a nullity and could be challenged in collateral proceedings (see *Grafton Isaacs v Emery Robertson* [1985] AC 97; *Lee Tain Tshung v Hong Leong Finance Bhd* [2000] 3 MLJ 364 and *Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd; (BSN Commercial Bank (M) Bhd & Ors, interveners)* [2000] 3 MLJ 201).

[38] For the same reasons that were canvassed in the foregoing, the argument that the appeal was fatal as the appellants had failed to first obtain leave of the winding up court under s 471 of the CA 2016 is a non-starter. Additionally, no leave is required as the action filed by the appellants was not to obtain any remedy for or against the company but to declare that the winding up of the company itself was null and void.

THE RESULT

[39] In the circumstances, and for the reasons provided, we were persuaded that the decision of the learned judge was plainly wrong and cannot be upheld. The appeal was therefore allowed and the order of the High Court was set aside with the consequential order that the matter be remitted to the High Court to be reheard with the appellants added as respondents. The first respondent was ordered to pay costs of RM15,000 as costs here and below subject to allocator fees. Deposit to be refunded.

Appeal allowed, order of High Court set aside and matter remitted to High Court to be reheard with appellants added as respondents.

Reported by Nabilah Syahida Abdullah Salleh